Supreme Court, U.S.
FILED

(1)

Docket No. 02 233

AUG 1 2002
OFFICE OF THE CLERK

**In The**

**Supreme Court of the United States of America**

**October Term, 2002**

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**IN THE MATTER OF**
**Nhan Khiem Tran,**
Petitioner,
v.
**United States of America,**
Respondent.

---

**On Petition For a Writ of Certiorari**
**To the United States Court of Appeals**
**For the Fifth Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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**Nhan Khiem Tran, Pro-Se**
**48684-079 #E**
**P. O. Box 7000**
**Texarkana, Texas 75505-7000**

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35 pp

## QUESTION PRESENTED

1. Whether the Fifth Circuit erred in holding, in square conflict with decisions of this Court and other Circuits, that layman masquerading as qualified attorney deny a Constitutional right.

2. Whether the Fifth Circuit erred in holding, in square conflict with decisions of this Court and other Circuit that signature on pleadings by layman masquerading as qualified Attorney was not a fraud upon the Court, and a jurisdictional question.

3. Whether the Fifth Circuit erred in square conflict with this Court, when it barred the Petitioner from ever obtaining Federal Habeas review.

4. Whether the Fifth Circuit erred in over-ruling this Court decision in *Pavelic & LeFlore V. Marvec Entertainment Group a Division of Cadence Industries Corp.* 493 US 120 (1989).

## PARTIES

| | |
|---|---|
| Petitioner | Nhan Khiem Tran |
| Respondent | United States of America |

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## PETITION FOR WRIT OF CERTIORARI

Nhan Khiem Tran, respectfully petitions this Court for a Writ of Certiorari, to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the Fifth Circuit (App.1) is unreported. The opinion of the District Court is published (App.2) as *U.S. v. Tran* 105 F.Supp.2d 608 (S.D. Tex. 2000).

## JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was issued on April 01, 2002. Petitioner's petition for Rehearing En-Banc was denied May 15, 2002 (App.3) and issued as a mandate on May 23, 2002 (App.4). The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the United States Constitution provides in pertinent part: No person shall be deprived of . . . liberty . . .without due process of law;

Amendment VI of the United States Constitution provides in pertinent part: to have the assistance of counsel for his defense.

Federal Rules of Civil Procedure 60(b)(3) provides in pertinent part:

> ... authorizes a Court on motion to relieve a party or his legal representative from a final judgement for ... fraud ... (whether heretofore denominated intrinsic or extrinsic). or any other reason justifying relief from operation of judgment.

## STATEMENT

Petitioner was convicted of the Federal Statutory crime of conspiracy to possess with the intent to distribute 3.4 Methylenedioxyamphetamine; 21 USC 841(a)(1) and (b)(1)(c) and 21 USC 846; and possess with the intent to distribute Methylenedioxyamphetamine, 21 USC 841(a)(1); 841(b)(1)(c).

On July 6th, 1992 Petitioner filed his Notice of Appeal to Fifth Circuit Court of Appeals.

On October 7th, 1993 the Fifth Circuit affirmed Petitioner conviction.

On April 23, 1997 a Non-Lawyer masquerading as a Lawyer filed a 2255 Application with the District Court.

On February 28, 2002 Petitioner filed a Federal Rules of Civil Procedure 60(b) motion after the Fifth Circuit issued an order on February 15, 2000 to do so. (App.5).

On July 11, 2000 the District Court issued its opinion and order denying Petitioners 60(b) motion acknowledging that the Application was signed by a non-lawyer masquerading as a lawyer. (App.2).

On July 28, 2000 the Petitioner filed his notice of appeal to the Fifth Circuit. (App.7).

On May 7, 2001 Petitioner filed his motion for certificate of appealability. (App.8).

On August 17, 2001 the Fifth Circuit granted (App.2) the Petitioner motion for certificate of appealability; for the issue of whether the District Court abused its discretion in denying Petitioner 60(b) motion since Tran did not sign his first 28 USC 2255 motion and Dirks was neither Trans Attorney nor qualified as Trans next of Friend . . . (App.6).

On September 17, 2001 Petitioner filed his Brief.

On November 1, 2001 the Government filed their Brief.

On November 13, 2001 the Petitioner filed his reply Brief.

On April 1, 2002 the Fifth Circuit issued it per curiam Order (App.1) approving a non-lawyer masquerading as a lawyer signing pleadings on behalf of others. (App.1).

## REASONS FOR GRANTING THE PETITION

It has long been a Black Letter Rule, that pleadings and filings in Federal Court can be signed by the individual pro-se, or his attorney, or next friend.

The Fifth Circuit decision sets dangerous precedence that a non-lawyer or some one masquerading as a lawyer can sign and file pleadings on behalf of others while not qualified as next friend.

Preparing legal papers, filing petitions and brief, and generally acting as an attorney is a violation of State and Federal provisions governing the unauthorized practice of law, and the Fifth Circuit decision approves of such maneuvers by persons masquerading as a lawyer, and allows fraud to be perpetrated on a Court at anytime.

Further the denial of the 60(b) motion would mean that for technical procedural reasons Petitioner would be barred from ever obtaining Federal Habeas Corpus review, when this Court has been reluctant to adopt such procedure.

### I. Allowing a non Lawyer masquerading as a Lawyer to file pleadings denies Constitutional rights.

Representation by unlicensed counsel denies the V Amendment right of due process of law, and the VI Amendment right of assistance of counsel. *McKinzie v. Ellis* 287 F2d 549 (5th cir 1961); *Jones v. State* 57 GA. App 344 195 S. F316 (1938); *Smith v. Buchanan* 291 KY 44/63 SW2d 5, 145 A. L. R. 813 (1942); *Jackson v. State* 316 P2d 213 (OKL 1957); *Martinez v. State* 167 Tex Crim 97, 318 SW.2nd 66(1958); *Achtien v. Dowd* 117 F2d 989 (7th cir 1947).

It is clear that these demands are not satisfied when the accused is represented by a layman masquerading as a qualified attorney. The fact is it is unthinkable that so precious rights can be entrusted to one who has not been admitted to practice law.

Failure to heed the Constitutional admonition that the accused enjoy the right to assistance of counsel negates completely the Courts jurisdiction to proceed. *Johnson v. Zerbst* 304 US 458, 468 (1939).

The rules of criminal and civil procedure contemplate that briefs and filings be signed and filed by either a pro-se party, or attorney, appointed or retained, but not by a third person, non-attorney. *United States v. Arlt* 560 F2d 200 (5th cir 1977); *Lepiscopo v. United States* 469 F2d 650 (5th cir 1972); *Massimo v. Henderson* 468 F2d 1209 (5th cir 1972); *Guajardo v. Luna* 432 F2d 1324 (5th cir 1970); *Turner* v. American Bar *Assoc.* 407 F. Supp 451 (W. D. Wis 1975).

The Fifth Circuit in their opinion (App.1) stated " Even assuming that the District Court erred when it determined that Dirks was Trans agent . . ." sets forth that they knew that a non-lawyer masquerading as a lawyer signed and filed pleadings on behalf of petitioner.

Petitioner asks this Court to grant review to resolve this issue.

## II. <u>The Signature and pleadings filed in this cause by a person masquerading as a Lawyer was fraud upon the Court.</u>

It is unquestioned and beyond doubt that David Dirks, was a disbarred Attorney, masquerading as an Attorney, when he signed Petitioners name to a 2255 Application and then filed the Application in Court. (App.9).

Relief under rule 60(b) may be granted when the Application is clearly substantiated by adequate proof. It is beyond doubt that the signature on the 2255 is not Petitioners and is supplemented with the initials "D. D" for David Dirks. (App.9).

What is clear, is that David Dirks failed to follow through with his scheme, and that was to file a points and authorities or brief in support of the 28 USC 2255 Application.

Under rule 60(b) a judgment may be set aside for fraud discovered after the entry of judgment. Obviously Petitioner did not discover the fraud until after the entry of judgment which he did not receive from the Court until after he requested it.

If this Court allows the Fifth Circuit decision to stand, then it will open the floodgates of prisoners and ex-prisoners of making bogus filings on behalf of others without impunity.

What is more shocking here than in *Hazel-Atlas Glass Co v. Hartford-Empire Co* 322 US 238 (1944) is that the Fifth Circuit is allowing someone "who was" an officer of the Court to perpetrate a fraud upon them.

The District Court failed to follow the safeguards set forth by this Court in *Universal Oil Products Co v. Root Refining Co* 328 US 575, 580 (1946). Normal adversary proceedings must be followed before the Court may set aside judgment, this means not only notice and an opportunity to be heard but also that fact finding be based upon testimony that is subject to examination and cross examination. *Moores Federal Practice* 3Ed.60.21(4)(F).

Petitioner placed affidavits before the Court that were uncontroverted by the respondent.

The filing of pleadings by a person masquerading as a lawyer and the District Court ruling on them is void, as the District Court had no jurisdiction to render, *Kalb v. Feverstein* 308 US 433 (1939).

This Court should accord the same distinction of fraud to non-lawyers masquerading as lawyers as you have to licensed lawyers.

## III. The Fifth Circuit Barred Petitioner From Ever Obtaining Federal Habeas Review.

In this case there is a risk that a denial of relief will produce injustice in other cases, and there is a risk of undermining the public's confidence in the judicial process, and that is, justice must satisfy the appearance of justice.

The injustice is the petitioner will never be able to obtain Federal Habeas review of his post conviction claims. *Stewart v. Martinez-Villareal* 523 US 637, 118 S. Ct 1618, 1622 (1998).

This Court also made it clear that petitioner should not be deprived of "One full bite of the Apple" because of technical errors. *Stewart v. Martinez-Villareal* 523 US 637 (1998).

To hold otherwise would mean the dismissal of a first Habeas petition for TECHNICAL PROCEDURAL reasons would bar the prisoner from ever obtaining Federal Habeas review *Stewart* @1622.

## IV. Did the Circuit Court Over-rule Pavelic & LeFlore v. Marvec Entertainment Group, a Division of Cadence Industries Corp. 493 US 120 (1989)?

Petitioner did not sign the 2255 filed in Court. Petitioner did not authorize another person or Lawyer to sign his name to a 2255 Application. (App.9)

The point that an unlicensed, disbarred attorney signed the petitioners name is undisputed.

In *Pavelic* this Court stated " and the purpose of the provision in question however, is not reimbursement but sanction: and the purpose of Rule 11 as a whole is to bring home to the individual signer his personal nondelegable responsibility . . . just as the Court expects the signer personally . . . to validate the truth and legal reasonableness of the papers filed". @ 493 US 120, 127.

The Circuit Court is sanctioning the petitioner instead of the disbarred Attorney that signed the 2255.

In this case there is not the slightest indication that petitioner signed the 2255 application, nor is there any indication that the Circuit Court accorded any measure of weight and influence of *Pavelic* as petitioner may be intrinsically entitled. *H. Black, The Law of Judicial Precedents 11* (1928) Quoted in *R. Aldisert the Judicial Process* 778-779 (1976).

## V. The issues presented is of great practical importance.

The questions presented is exceptionally important because the commands of the V Amendment of the United States Constitution . . . without due process of law; and the VI Amendment right to effective counsel, that is not masquerading as one, are violated by the Fifth Circuit's Opinion.

Does the Fifth Circuit decision risk undermining the public's confidence in the judicial process by allowing filings and signing of

pleadings by persons masquerading as lawyers, and open the floodgates in the future of such maneuvers.

This is the type of extraordinary circumstances of 60(b) that justifies relief.

## CONCLUSION

The adverse effect of such judicial uncertainty of due process is an unconstitutional extension of Federal power that is ripe for review by this Court, which can be fully remediated.

The petition for Writ of Certiorari should be granted.

Respectfully Submitted

"S Nhan Khiem Tran "

# APPENDIX

**APPENDIX-1 OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS FILED APRIL 01, 2002**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 00-20901
Summary Calendar

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U.S. COURT OF APPEALS
FILED
APR 01 2002
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NHAN KHIEM TRAN, also known as Tony Tran,
also known as Larry Tran,

Defendant-Appellant.

---

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-00-CV-1686
USDC No. H-89-CR-135-2

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Before DAVIS, BENAVIDES and CLEMENT, Circuit Judges.
PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Nhan Khiem Tran ("Tran"), federal prisoner # 48684-079, appeals the district court's denial of his motion filed pursuant to Fed. R. Civ. P. 60(b). Tran argues that the district court erred in determining that Dirks was authorized to sign his motion filed pursuant to 28 U.S.C. § 2255 as Tran's authorized agent because Dirks does not qualify as Tran's next friend. Even assuming that the district court erred when it determined that Dirks was Tran's agent, "[i]t is not enough that the granting of [Rule 60(b) relief] might have been permissible, or even warranted–denial must have been so unwarranted as to constitute an abuse of discretion." Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981). Tran did not demonstrate in his Rule 60(b) motion, nor does he show on appeal, that he was prejudiced in any particular way by Dirks signing Tran's name to the motion. Thus, he fails to show that the district court's denial of his Rule 60(b) motion was an abuse of discretion.

Tran also argues that Judge Hughes should be recused from his case. This court will not address this argument because the COA was granted only on the issue discussed above. See Lackey v. Johnson, 116 F.3d 149, 151-152 (5th Cir. 1997)

The motion to supplement the record is moot in light of the opinion.

AFFIRMED.

**APPENDIX-2 DISTRICT COURT SOUTHERN DISTRICT OF TEXAS OPINION FILED JULY 11, 2000**

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**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**

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| | | |
|---|---|---|
| UNITED STATES OF AMERICA | § | United States Courts Southern District of Texas ENTERED |
| | § | |
| versus | § | JUL 11 2000 CRIMINAL H-89-135-02 |
| | § | |
| NHAM KIEM TRAN | § | Michael N. Milby, Clerk of Court |

## Opinion on Denial of Relief from Judgment

Nhan Kiem Tran has moved—with the assistance of a fellow inmate Lawrence Kenemore, Jr.—for the court to vacate its judgment on his application for a writ of habeas corpus because he says he was tricked. See Rule 60(b) and 28 U.S.C. § 2255. Tran's motion will be denied.

A jury convicted Nhan Kiem Tran and his brother of several methamphetamine offenses. Two facts may create confusion in this case: *Nhan* Kiem Tran's brother's name is *Nha* Kiem Tran, and some of Nhan's filings identify his names as *Nham* or *Khiem.* Even the affidavit he attached to his motion to vacate contains two distinct spellings of his name.

With the help of inmate David Dirks, Nhan Tran applied for habeas corpus relief. The court denied the application in June of 1997. In mid-1999,

Tran complained that Dirks had mis-identified himself as an attorney, with Tran later discovering that Dirks was not an attorney. Tran says that his first application was not valid because Dirks signed the civil cover sheet and the application instead of Tran or a real attorney.

Dirks acted as Tran's agent. The. authorized acts of an agent bind the principal. An agent has actual authority when the principal instructs him to handle a matter for him. *See Mexico's Industries, inc.* v. *Banco Mexico Somex*, S.N.C., 858 S.W.2d 577, 583 (Tex. App.--El Paso, 1993, reh'g overr.) (binding corporation to its agent's acts). Tran as the principal and Dirks as the agent specifically arranged orally and in writing for Dirks to prepare and file Tran's application for a writ of habeas corpus. Dirks had actual authority to act on Tran's behalf and to bind him.

The attorney-layman distinction is not a defense. Tran admits that Dirks acted as his representative at Tran's request and at Tran's expense. Tran knew that Dirks was a fellow prisoner, and he does not allege that he ever asked Dirks about a law license, and the other documents show that Tran had actual knowledge that Dirks was a "substitute counsel." Many inmates rely on other ones to help them write and file court papers in exchange for money or other favors.

By attaching copies of Christmas cards and other correspondence that

apparently update Tran on Dirks's progress in drafting the application, Tran has attempted to show that Dirks defrauded him. The correspondence appears to be addressed not to Tran but to his brother Nha. Even assuming scrivener's error—that Dirks believed he had written to Nhan—the letters prove nothing. In fact, the correspondence shows that Dirks drafted the application and filed it just as he had promised to do. Also, the receipts of payments by Nha to Dirks call him a "legal consultant" not an attorney, so it is clear that Dirks did not even hold himself out to be an attorney on Tran's own record. Dirks used the form for people who do not have attorneys and did not himself sign the line for "signature of attorney."

The drafter of the motion need not be an attorney or the plaintiff himself. It suffices that the drafter be Tran's representative. Tran asked Dirks for his help and paid him for his services. Dirks prepared, signed, and filed the application for Tran all with Tran's knowledge and consent. The application filed and signed by Dirks on behalf of Tran is valid as Tran's act. Tran may not now come before this court and retract his application filed on April 23, 1997. By his logic in this motion, he can repudiate Kenemore's acts when this motion fails.

Finally, although he complains about the services he received from an unlicensed fellow inmate from 1995 to 1997, Tran has admitted that he relied

on another inmate— Lawrence Kenemore, Jr. —to prepare his current motion to vacate and application for writ of habeas corpus. Tran may not rely on others to assist him and then disavow their work when it is ineffectual. -

Signed July _____, 2000, at Houston, Texas.

"

"s

Lynn N. Hughes
United States District Judge

**APPENDIX-3 DENIAL OF PETITION FOR REHEARING EN-BANC FIFTH CIRCUIT COURT OF APPEALS DATED MAY 15, 2002**

IN THE UNITED STATES COURT OF APPEARS

FOR THE FIFTH CIRCUIT

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No. 00-20901

---

U.S. COURT OF APPEALS
FILED
MAY 15 2002
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

NHAN KHIEM TRAN, also known as Tony Tran, also known as Larry Tran

Defendant - Appellant

---

Appeal from the United States District Court for the Southern District of Texas, Houston

---

ON PETITION FOR REHEARING EN BANC

(Opinion 04/01/02, 5 Cir., _____, _____ F.3d _____ )

Before DAVIS, BENAVIDES and CLEMENT, Circuit Judges.

PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Petition or Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R.

35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

"

"S W. Eugene Davis
United States Circuit Judge

REHG-6a

**APPENDIX-4 JUDGMENT ISSUED AS A MANDATE**
**FIFTH CIRCUIT COURT OF APPEALS**
**DATED MAY 23, 2002**

**United States Court of Appeals**
**FIFTH CIRCUIT**
**OFFICE OF THE CLERK**

CHARLES R. FULBRUGE III
CLERK

TEL.504-310-7700
600 CAMP STREET
NEW ORLEANS, LA 70130

May 23, 2002

Mr Michael N Milby, Clerk
Southern District of Texas, Houston
United States District Court
Room 5300
515 Rusk Avenue
Houston, TX 77002

No. 00-20901 USA v. Tran
USDC No. H-00-CV-1686
H -89-CR -135-2

Enclosed, for the district court only, is a certified copy of the judgment issued as the mandate.

Enclosed, for the district court only, is a copy of the court's opinion.

Record/original papers/exhibits are returned:

10 ) Volumes (1 ) Envelope ( ) Boxes
(SEALED)

Sincerely,

CHARLES R. FULBRUGE III, Clerk

"S By: Dawn D. Victoriano, Deputy Clerk "

cc: (letter only)
Honorable Lynn N Hughes
Mr Jeffery Alan Babcock
Mr Nhan Khiem Tran

MDT-1

**APPENDIX-5 ORDER OF THE FIFTH CIRCUIT COURT OF APPEALS TO THE DISTRICT COURT SOUTHERN DISTRICT OF TEXAS FILED FEBRUARY 15, 2000**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20575

U.S. COURT OF APPEALS
FILED
FEB 15 2000
CHARLES R. FULBRUGE III
CLERK

IN RE : NHAN KIEM TRAN,

Movant.

Motion for an order authorizing
the United States District Court for the Southern
District of Texas to consider
a successive 28 U.S.C. § 2255 motion

Before SMITH, BARKSDALE and PARKER, Circuit Judges.

BY THE COURT:

Nhan Khiem Tran ("Tran"), federal prisoner #48684-079, moves for this court to authorize him to file a second or successive 28 U.S.C. § 2255 motion. He argues, however, that his proposed § 2255 motion is not successive because the first § 2255 motion filed on his behalf was not valid and should have been stricken because it was not signed by an attorney or a party as required by Fed. R. Civ. p. 11(a). Tran's Bole means of acquiring

the relief that he seeks is a Fed. R. Civ. P. 60(b) motion, filed in the district court, attacking and seeking to vacate the district court's order disposing of his first § 2255 motion. Accordingly, Tran's motion for leave to file a successive § 2255 motion is DENIED WITHOUT PREJUDICE to his right to refile it should (1) he relinquish his argument to have the order denying his first § 2255 motion vacated or (2) the district court refuse to vacate the order on Rule 60(b) grounds.

**APPENDIX-6 GRANTING CERTIFICATE OF APPEALABILITY BY THE FIFTH CIRCUIT COURT OF APPEALS FILED AUGUST 17, 2001**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20901
USDC Nos. H-00-CV-1686
H-89-CR-135-2

U.S. COURT OF APPEALS
FILED
AUG 17 2001
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

NAHM KHIEM TRAN, also known as Tony Tran,
also known as Larry Tran,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ORDER:

Nham Khiem Tran, federal prisoner # 48684—079, seeks a certificate of appealability (COA) to appeal district court's denial of his Fed. R. Civ. P. 60(b) motion seeking to vacate the district court's order disposing

of Tran's first 28 U.S.C. § 2255 motion. Tran contends that the district court erred in determining that David Dirks, an inmate who prepared and signed Tran's motion, had actual authority to act on Tran's behalf. Tran argues that his first 28 U.S.C. § 2255 motion was invalid because it was neither signed by Tran nor an attorney.

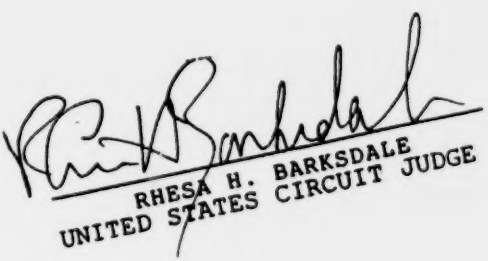
A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c) (2). When the district court's denial of federal habeas relief is based upon procedural grounds without analysis of the underlying constitutional claim, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). We review the denial of a Rule 60(b) motion for an abuse of discretion. Travelers Ins. Co. v. Lilieberg Enter., Inc., 38 F.3d 1404, 1408 (5th Cir. 1994); Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981).

Tran has demonstrated that jurists of reason would find it debatable whether the district court was correct in denying Tran's Rule 60(b) motion. Accordingly, his COA motion is GRANTED. IT IS ORDERED THAT the

parties brief the issue whether the district court abused its discretion in denying Tran's Rule 60(b) motion since Tran did not sign his first 28 U.S.C. § 2255 motion and Dirks was neither Tran's attorney nor qualified as Tran's next friend for purposes of signing the motion on Tran's behalf. See Whitmore V. Arkansas, 495 U.S. 149, 163—65 (1990); Weber v. Garza, 570 F.2d 511, 513 (5th Cir. 1978) . A briefing schedule will be established by the Clerk of this Court.

"

"S



RHESA H. BARKSDALE
UNITED STATES CIRCUIT JUDGE

**APPENDIX-7 WRIT OF MANDAMUS CONSTRUED AS A NOTICE OF APPEAL BY THE FIFTH CIRCUIT OF APPEALS FILED OCTOBER 03, 2000**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COURT OF APPEALS
FILED
OCT 03 2000
CHARLES R. FULBRUGE III
CLERK

No. 00-20660

USDC No. 4:89-CR-135

IN RE:

NHAN KIEM TRAN,

Petitioner.

Petition for a Writ of Mandamus
to the United States District Court
for the Southern District of Texas

Before DAVIS, WIENER, and BARKSDALE, Circuit Judges.

BY THE COURT:

Nham Kiem Tran, federal prisoner # 48684—079, has filed a petition for a writ of mandamus in which he complains that the district court did not adequately rule on his Fed. R. Civ. P. 60(b) motion. Tran argues that, because the district court's July 11, 2000, order did not rule on the 60(b)

motion, Tran's appeal right has been prejudiced.

On July 11, 2000, the district court did enter a one—line order denying Tran's "motion to vacate his sentence and his application for habeas corpus"; the order referenced two documents, one of which was Tran's March 1, 2000, motion under Rule 60 (b) . However, on that same date the district court entered its "Opinion on Denial of Relief from Judgment," which detailed its reasons for denying Rule 60(b) relief. Tran's request for mandamus relief is therefore moot.

However, we construe Tran's pro se mandamus petition, received in this court 22 days after entry of the district court's order denying the Rule 60(b) motion, as a timely notice of appeal from that order. See Yates v. Mobile County Personnel Board, 658 F.2d 298, 299 (5th Cir. Unit B Oct. 1981) ; Fed. R. App. P. 4(a) (1). The Clerk is directed to transmit Tran's petition for a writ of mandamus, dated July 28, 2000, and received in this court on August 2, 2000, to the district court to be filed as a notice of appeal from the district court's order entered July 11, 2000, denying Tran's Rule 60(b) motion.

SO ORDERED.

**APPENDIX-8 MOTION FOR CERTIFICATE OF APPEALABILITY FIFTH CIRCUIT COURT OF APPEALS FILED MAY 07, 2001**

No. 00-20901

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
PLAINTIFF/APPELLEE

v.

NHAN KHIEM TRAN
AKA: TONY TRAN
LARRY TRAN
DEFENDANT/APPELLANT

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT SOUTHERN DISTRICT OF TEXAS
HONORABLE LYNN HUGHES DISTRICT JUDGE
CAUSE NO. h-89-135-02

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APPELLANTS MOTION FOR
CERTIFICATE OF APPEALABILITY

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Legal Advocate
Lawernce D. Kenemore Jr
26175-077 #G
P.O. Box 7000
Texarkana, Texas 75505-7000

Nhan Khiem Tran
48684-079 #E
P.O. Box 7000
Texarkana, Texas 75505-7000

## STANDARD OF REVIEW

**Barefoot v. Estelle 463 US 880 (1983)**

**Streetman v. Lynaugh 835 F2d 1521 (5th cir 1988)**

**Lancaster v. Presley 35 F3d 229 (5th cir 1994)**

Comes now, Nhan Khiem Tran, and moves the Court pursuant to 28 USC 2253 and pursuant to **Barefoot v. Estelle 463 US 880 (1983)** to grant him a Certificate of Appealability on the denial by the District Court of his Rule 60(b) Motion.

The standards governing this motion are:

1. Whether Appellant has made a substantial showing of the denial of a Federal Right **Brogdon v. Butler 824 F2d 338, 340 (5th cir 1987).**
2. The issue is debateable among jurist of reason.
3. That a Court could resolve the issue in a different manner.
4. The question is adequate to deserve encouragement to proceed further.

Appellant will address each standard individually, but for clarity sets forth.

## I

## FACTS

Defendant, Nhan Khiem Tran, on April 10, 1989 was named in three count indictment in Southern District of Texas, Houston Division, case number CR-H-89-135-02.

Count 1 charged the Defendant with 21 USC 841(a)(1) and (b)(1)(c) and 846 " Conspiracy to possess with intent to distribute 3, 4 Methylenedioxyamphetamine (MDA).

Count 2 charged the Defendant with 21 USC 841(a)(1) and (b)(1)(c) " Possession with intent to distribute 3, 4 Methylenedioxyamphetamine (MDA).

Count 3 charged Defendant with 21 USC 841(a)(1) and (b)(1)(c) and 18 USC 2 " Intent to possess with intent to distribute 3, 4 Methylenedioxyamphetamine, Aiding and Abetting.

Trial was held from October 15, 1991 to October 24, 1991 wherein a jury found the Defendant guilty of all three counts.

Sentencing was held on June 22nd, 1992 with a sentence adjudged of 240 months.

On July 6, 1992, Defendant filed his Notice of Appeal to the Fifth Circuit Court of Appeals.

On October 7, 1993, the Fifth Circuit affirmed Defendant conviction without any written opinion.

On October 19th, 1993, Defendant filed a petition for rehearing, which

was denied on November 16th, 1993.

On January 27th, 1994, Defendant filed an application for a Writ of Certiorari to the United States Supreme Court which was denied on February 28th, 1994. In March, 1994, Defendant filed a petition for rehearing which was denied on April 18th, 1994.

After arrival at FCI Texarkana, Defendant met another Inmate who purported to be an Attorney and offered to help the Defendant file a Writ of Certiorari to the United States Supreme Court on his direct Appeal and file, write a Brief and subsequently answer the respondent's response to a 28 USC 2255 Motion by name David Dirks on or about March 20th, 1995. David Dirks was subsequently transferred from FCI Texarkana.

On April 23rd, 1997, David Dirks prepared, signed and filed a 28 USC 2255 Application for the Defendant. On June 17th, 1997, the 28 USC 2255 Motion was denied in an order by the District Court Judge.

On February 3rd, 1999, Defendant wrote to the District Clerk for a Docket Sheet on his 2255 Motion. On February 9th, 1999, Defendant received from the District Court Clerk his Docket Sheet and discovered at that time that his 28 USC 2255 Application has been denied.

On Jan 21, 2000 Appellant filed with this Court in cause No. 99-20575 a motion for authority to file a **SECOND** or **SUCCESSIVE** 28 USC 2255.

On 2-15-2000 this Court issued an order wherein pertinent part stated " Trans Motion for leave to file a **SUCCESSIVE** 2255 motion is denied without prejudice to his right to refile it should (1) He relinquish his argument to have the order denying his first 2255 motion vacated or (2) The District Court refuse to vacate the order on rule 60(b) grounds. Emphasis added see (Exhibit-T) of Appellants 28 USC 2255 attached to his Rule 60(b) Motion.

## II

## ARGUMENT

Attached as (Exhibit-P-R-S) to Appellants 28 USC 2255 to Appellants 28 USC 2255 attached to his Rule 60(b) Motion are affidavits attesting to the belief of whom David Dirks was, the job and performance of David Dirks, and the fact of the falsified signature of Appellant on the first 28 USC 2255 **APPLICATION**.

With these facts and Exhibits Appellants:

1. Has made a showing of the denial of the Federal right of Due Process and the loss of the right to receive an adjudication of his claims. **Stewart v. Martinez-Villareal 523 US 637, 645 (1998)**

2. It is clear from this circuit own case law that the signature of a non-lawyer on Appellants filed first 28 USC 2255 **APPLICATION** is debateable among jurist of reason that it cannot be done and that the issue of principle and agent cannot apply.

3. This Court pursuant to prior precedent could resolve this issue in a different manner by allowing Appellant to file a 28 USC 2255 **Stewart v. Martinez-Villareal 523 US 637, 645 (1998); Turner v. American Bar Assn. 407 F. Supp 451, 477 (N.D. Tex 1975).**

4. The question of allowing a Non-Lawyer to sign legal papers as representation, and to purport to be an Attorney is a question adequate to deserve encouragement to proceed.

Appellant would point out that the collecting of funds purporting to be an Attorney, filing legal documents, and signing Appellants name to legal documents, is recognizable as fraud under Rule 60(b) and violated Federal Rules Criminal Procedure 11(a).

Appellant would point out that he has attached hereto his 28 USC 2255 that he wishes to file but would point out to this Court that " an Appeal from denial of a 60(b) motion **DOES NOT** bring up the underlying judgment ". Emphasis added **Browder v. Director Ill. Dept of Corrections 434 US 257, 263 N.2b.; Edwards v. City of Houston 78 F3d 983, 995 (5th cir 1996 EN-BANC).**

The abuse of discretion standard of review for review of a District Court denial of Rule 60(b) Motion is what is used by this circuit **Lancaster v. Presley 35 F3d 229, 231 (5th cir 1994)** " . . . Decision to deny the motion must have been sufficiently unwarranted as to amount to an abuse of discretion " see

also **Fackelman v. Bel 564 F2d 734, 736 (5th cir 1972).**

The fact that the District Court did not address is that all that was filed by David Dirks was an **"APPLICATION"** no case law or argument was made on behalf of Appellant. This was done without the knowledge or consent of Appellant. Appellant in his own affidavit did not know that just an Application was filed until he wrote the Court.

For these reasons Appellant asks this Court to issue a Certificate of Appealability to file the attached Brief.

"S Nhan Khiem Tran"

**EXHIBITS**

**Nhan Khiem Tran**
**48684-079 # E**
**P.O. Box 7000**
**Texarkana, Texas 75505-7000**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| **Nhan Khiem Nhan** | § | |
| Petitioner | § | **Civil No. _____** |
| | § | |
| **v.** | § | **Criminal No. H- 89- 135- 02** |
| | § | |
| | § | |
| **UNITED STATES OF AMERICA** | § | |
| _____ | § | |

**MOTION ATTACKING JUDGEMENT**
**OF CONVICTION AND SENTENCE**

**( 28 U.S.C. 2255 )**
**MEMORANDUM WITH POINTS OF LAW IN SUPPORT**
**OF MOTION TO VACATE, SET ASIDE OR CORRECT**
**SENTENCE FOR A PERSON IN FEDERAL CUSTODY**

To the Honorable Lynn N. Hughes United States District Judge:

Comes now, petitioner, Nhan Khiem Tran and files this memorandum with points of law in support of motion to vacate, set aside or correct sentence for a person in federal custody, respectfully showing this

Honorable Court as follows :

I, Nhan Khiem Tran, certifies, that on the _____ day of _____ 2001 placed in the Inmate Mail System 1st Class Postage Pre-Paid a copy of the attached Appellants motion for Certificate of Appealability to:

AUSA
James Turner
Appellate Division Chief
910 Travis, Suite 1500
P.O. Box 61129
Houston, Texas 77208

"S "
Nhan Khiem Tran

# APPENDIX-9 CIVIL COVER SHEET
## 97-1405 28 USC 2255 APRIL 23, 1997

**CIVIL COVER SHEET** H - 97 - 1405

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

(a) PLAINTIFFS: Nguyen KIEM TRAN a/k/a Tony TRAN

DEFENDANTS: United States of America

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF: Bexar, Tx (EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED

APR 23 1997

MICHAEL N. MILBY, Clerk of Court

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER): Pro Se

ATTORNEYS (IF KNOWN): U.S. Attorney

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) (For Diversity Cases Only)

| | PTF | DEF | | PTF | DEF |
|---|---|---|---|---|---|
| Citizen of This State | 1 | 1 | Incorporated or Principal Place of Business in This State | 4 | 4 |
| Citizen of Another State | 2 | 2 | Incorporated and Principal Place of Business in Another State | 5 | 5 |
| Citizen or Subject of a Foreign Country | 3 | 3 | Foreign Nation | 6 | 6 |

IV. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

1 Original Proceeding; 2 Removed from State Court; 3 Remanded from Appellate Court; 4 Reinstated or Reopened; 5 Transferred from another district (specify); 6 Multidistrict Litigation; 7 Appeal to District Judge from Magistrate Judgment

V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

| CONTRACT | TORTS | | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES |
|---|---|---|---|---|---|
| 110 Insurance<br>120 Marine<br>130 Miller Act<br>140 Negotiable Instrument<br>150 Recovery of Overpayment & Enforcement of Judgment<br>151 Medicare Act<br>152 Recovery of Defaulted Student Loans (Excl. Veterans)<br>153 Recovery of Overpayment of Veteran's Benefits<br>160 Stockholders' Suits<br>190 Other Contract<br>195 Contract Product Liability | PERSONAL INJURY<br>310 Airplane<br>315 Airplane Product Liability<br>320 Assault, Libel & Slander<br>330 Federal Employers' Liability<br>340 Marine<br>345 Marine Product Liability<br>350 Motor Vehicle<br>355 Motor Vehicle Product Liability<br>360 Other Personal Injury<br>PERSONAL INJURY<br>362 Personal Injury – Med. Malpractice<br>365 Personal Injury – Product Liability<br>368 Asbestos Personal Injury Product Liability<br>PERSONAL PROPERTY<br>370 Other Fraud<br>371 Truth in Lending<br>380 Other Personal Property Damage<br>385 Property Damage Product Liability | | 610 Agriculture<br>620 Other Food & Drug<br>625 Drug Related Seizure of Property 21 USC 881<br>630 Liquor Laws<br>640 R.R. & Truck<br>650 Airline Regs<br>660 Occupational Safety/Health<br>690 Other<br>LABOR<br>710 Fair Labor Standards Act<br>720 Labor/Mgmt. Relations<br>730 Labor/Mgmt. Reporting & Disclosure Act<br>740 Railway Labor Act<br>750 Other Labor Litigation<br>791 Empl. Ret. Inc. Security Act | 422 Appeal 28 USC 158<br>423 Withdrawal 28 USC 157<br>PROPERTY RIGHTS<br>820 Copyrights<br>830 Patent<br>840 Trademark<br>SOCIAL SECURITY<br>861 HIA (1395ff)<br>862 Black Lung (923)<br>863 DIWC/DIWW (405(g))<br>864 SSID Title XVI<br>865 RSI (405(g))<br>FEDERAL TAX SUITS<br>870 Taxes (U.S. Plaintiff or Defendant)<br>871 IRS – Third Party 26 USC 7609 | 400 State Reapportionment<br>410 Antitrust<br>430 Banks and Banking<br>450 Commerce/ICC Rates/etc.<br>460 Deportation<br>470 Racketeer Influenced and Corrupt Organizations<br>810 Selective Service<br>850 Securities/Commodities/Exchange<br>875 Customer Challenge 12 USC 3410<br>891 Agricultural Acts<br>892 Economic Stabilization Act<br>893 Environmental Matters<br>894 Energy Allocation Act<br>895 Freedom of Information Act<br>900 Appeal of Fee Determination Under Equal Access to Justice<br>950 Constitutionality of State Statutes<br>890 Other Statutory Actions |
| REAL PROPERTY | CIVIL RIGHTS | PRISONER PETITIONS | | | |
| 210 Land Condemnation<br>220 Foreclosure<br>230 Rent Lease & Ejectment<br>240 Torts to Land<br>245 Tort Product Liability<br>290 All Other Real Property | 441 Voting<br>442 Employment<br>443 Housing/Accommodations<br>444 Welfare<br>440 Other Civil Rights | 510 Motions to Vacate Sentence HABEAS CORPUS<br>530 General<br>535 Death Penalty<br>540 Mandamus & Other<br>550 Civil Rights<br>555 Prison Condition | | | |

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

28 USC § 2255

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint. JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE: 22 April 97

SIGNATURE OF ATTORNEY OF RECORD: Nguyen K. Tranfield

FOR OFFICE USE ONLY

RECEIPT #. _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

BEST AVAILABLE COPY

AO 243 (Rev. 5/85)

(e) On appeal Jane C. Disko, 1301 McKinley, Ste 3100, Houston, TX 77010

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future N/A

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

22 April 94
(date)

Robert K. Thornfield
Signature of Movant